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The Position and Application of Islamic Legal Maxims (*Qawaa'id Al-Fiqhiyyah*) in the Law of Evidence (*Turuq Al-Hukmiyyah*)

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Abstract

Islamic legal maxims had always held and will continue to hold a special position in jurisprudence. Jurists of all schools generally accept legal maxims as a basis of coming up with Shariah opinions. This is especially true if these maxims are based on the Holy Quran and the Prophetic traditions. Legal maxims can be used as evidence in extracting rules if it is based on the Holy Quran and the Sunnah because its use is an extension of the original proof, and thus, this article will relate some of the important legal maxims relating to the law of evidence.

Keywords: *Islamic Legal Maxims; Law of Evidence; Islamic Law; Qawaa'id al Fiqhiyyah; Turuq al-Hukmiyyah*

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A. Introduction

In general, Islamic law includes the fundamental principles as well as the sub-rules. Fundamental principles are further divided into two types. First, what is known as *usul al fiqh*, which is rules and principles arising from the Arabic words and what relates to it, such as *naskh*. i.e. abrogation, *tarjih*, i.e. preference, etc. Secondly, universal legal maxims which are much in

quantity outspread in magnificence, inclusive of the rational and wisdom of Islamic rulings and injunction. Thus, the knowledge of Islamic legal maxims (*Qawaid al Fiqhiyyah*) is essential and complementary to the knowledge on the principles of *Usul-al Fiqh* (Islamic Jurisprudence) and *Maqasid al Syariah* (Objectives of Islamic law).¹

B. Method

The knowledge of Islamic jurisprudence (*usul al-Fiqh*) is one of the most honourable subjects require legal research, as it defines the ways of both legal aspects, i.e. criminal and civil matters. Furthermore, it encapsulates the divine rules and regulations about all humankind and specifies the methods that are to be applied. The knowledge of Islamic legal maxims (*Qawaa'id al-Fiqhiyyah*) is very important and is complementary to the knowledge of the principles of Islamic jurisprudence and objectives of Islamic law (*Maqasid al-Syariah*). Although the main reference of this article is on *The Mejelle al-Ahkam al-Adliyyah*, which is not considered as a primary source, it is nevertheless authoritative and essential reference. It is so since the extraction of the rules presents the right methodology and principles given that the divine texts (*nass*) provide general guidelines since rulings are getting more complex each day such that it necessitates a method of mining these legal maxims.

C. Discussion

The proof is of supreme importance to the administration of justice because, as a tradition of the Prophet says, "If people's claims were accepted on their face value, some persons would claim other people's blood and properties ...".² The necessity of proof is thus a restrainer to false, weak, and unsubstantiated claims. This general principle occasionally entails some dangers because a claim, though authentic, is of no consequence if the claimant is unable to prove it. Only those claims, which can be substantiated, are upheld even though they are based upon some secretly forged, but sound, proof. The Prophet warned those who make false claims by saying, "You come to me for adjudication. Perhaps some of you are cleverer in argument than others. If I should adjudicate in favour of a person against his brother depending upon the former's statements while the latter in reality is in the right, then I would only be handing the former a piece of hell. Let him not

¹For further discussion, See Azman Ismail & Habibur Rahman. *Islamic Legal Maxims: Essentials and Applications*. (2013). Kuala Lumpur: IBFIM. Luqman Zakariyyah. *Legal Maxims in Islamic Criminal Law: Theory and Applications*. (2015) Netherlands: Brill Nijhoff, Printforce.

²*Marghinani, Hidayah*, IV, p.141.

take it.”³

The proof of a matter requires presentation of evidence until the matter attains the degree of certainty. Certainty is that which can be established by sight or proof, and It can only be dispelled by another certainty. Next in the degree to certainty is hesitation. It is consists of three categories: *zann* (conjecture), *shakk*, (doubt), and *wahm* (fancy). *Zann* means siding, in case of hesitation, towards the correctness (of evidence). But it is not sufficient to prove the opposite of certainty, because "conjecture can by no means take the place of truth".⁴ It is particularly so if the fallacy in the conjecture is clear. Thus the *Majallah* says, "No validity is attached to conjecture which is tainted by error" (Article 72).⁵ However, if the conjecture is the most plausible (probable), it may take the place of certainty when the latter is unattainable. For example; if the sinking of a ship has been established, the death of those on board would be presumed based on plausible conjecture (probability). *Shakk* (doubt) is that which wavers between certainty and uncertainty but without either of these states being dominant over the other. *Shakk* is not sufficient to dispel certainty. Husayn al-Marwarrudi made this principle one of the four principles, which, he said, support the structure of jurisprudence.⁶It was embodied in the *Majallah* thus: "Certainty is not dispelled by doubt" (Article 4).⁷

Wahm (fancy) means siding, in case of hesitation, towards the incorrectness (error) and is of no consequence. The *Majallah* says, "No weight is attached to fancy" (Article 74).⁸Likewise, the mere supposition is to be rejected.

In summary, it is a fundamental rule that weight should only be attached to certainty and to what may be established by evidence. Thus the *Majallah* says,⁹ "No argument is admitted against supposition based upon evidence: Example: if a person admits while suffering from a mortal sickness that he owes a certain sum of money to one of his heirs, such admission is not proof unless confirmed by the other heirs, since' the supposition of such person defrauding the other heirs of their property is based upon the mortal sickness. If the statement, however, is made while in a state of good health, such admission is considered to be valid. The supposition of defrauding the heirs, in that case, is a mere supposition, and consequently, there is no

³Shahih Muslim Book V, p.128.

⁴ Holy *Quran* 10: 6

⁵ Ayni, *Umdat*, XIII, p.257.

⁶ Taj al Din al-Subki in *Jam*, II, p.373.

⁷ Suyuti, *Ashbah*, 37 and 54; and Ibn Nujaym, *Ashbah*, 22 and 29.

⁸ This principle can be found in *Majmac* al-Fatawa by-Ahmad Ibn Muhammad In Abi Bakr. See the explanation of Article 74 in *Mirati Majallah Ahkami Adliyah*.

⁹ Guzelhisari, *Manafi*, p.329.

objection to the validity of the admission" (Article 73).¹⁰ Some things may be established by inspection; others require proof; the two methods are equal in weight. To use the words of the jurists and Article 75 of the *Majallah*, "A thing established by proof is equivalent to a thing established by visual inspection".

1. The Burden of Proof

There are at least in every judicial dispute two litigant parties, the plaintiff and the defendant. The first claim what is contrary to the apparent fact; the second holds to the apparent fact and denies the claim.¹¹ If proof, as we have seen, is such an important juridical requirement, it becomes important to know upon whom the onus of proof lies. There is no doubt that the burden is upon the plaintiff.¹² It is explained by the fact that what is apparent is presumed to be the original state; anyone who claims to the contrary must prove such a claim. The *Majallah* says,¹³ "The object of evidence is to prove what is contrary to the apparent fact. The object of the oath is to ensure the continuance of the original state" (Article 77) and "The burden of proof is on him who alleges; the oath on him and who denies." (Article 76). The latter article is based upon a tradition of the Prophet (PBUH) to the same effect.¹⁴

In other words, if someone claims something from another, he must prove it, because a defendant is presumed to be a free liability. Thus the *Majallah* says, "Freedom from liability is a fundamental principle. Therefore, if one person destroys the property of another and a dispute arises as to the amount thereof, the statement of the person causing such destruction shall be heard, and the burden of proof, as to any amount over the testified amount is upon the owner of such property." (Article 8). This was one of the principle upon which the *Shafie* jurists based their theory of *istishab* or presumption of continuity and upon which they built similar principles such as: "It is a fundamental principle that a thing shall remain as it was originally" (*Majallah*, Article 5) and "Judgment shall be given in respect to any matter which has been proved at any particular time, unless the contrary is proved" (*Majallah*, Article 10).

The principle of freedom from liability necessitates the rejection of a

¹⁰ This example is accepted by the Hanafi, School. Other schools, however, disagree on it. See Mahmassani, *Nazariyah*, II, 142 ff.

¹¹ See the definitions of plaintiff and defendant in Marghinani, *Hidayah* III, p.142.

¹² See the Latin proverbs : "Actori incumbit probatio", and "Ei incumbit probatio qui dicit non qui negat."

¹³ This is quoted with a variant reading in Khadimi's *Majami*. See uzalhisari, *Manafi*, 314.

¹⁴ Mentioned by Suyuti in *Jami Saghir*, Nos. 3225 and 3226 on the authority of Tirmidhi and Baihaqi.

claim which cannot be proved, and requires a return to the original state; The *Majallah* says,¹⁵ "Things which have been in existence from time immemorial shall be left as they were" (Article 6). But this is qualified by another article, which reads: "Injury cannot exist from time immemorial" (Article 7). Furthermore, attributes are of two kinds: original and intervening (transitory). The original are those, which existed with the object initially, for example, presuming that a person who has reached adult legal age is of sound mind because the attribute of sanity is fundamental with the majority and exists with it initially. The intervening (transitory) attribute does not exist initially with the object described. It can be exemplified by madness or drunkenness. These qualities are not presumed to exist originally, and a person who claims their existence must prove his contention.

The principle to be deduced from the aforementioned is that original attributes are presumed to exist, whereas intervening (transitory) attributes are presumed not to exist. The *Majallah* says,¹⁶ "Non-existence is a fundamental presumption attached to intervening (transitory) attributes. Example: In case of a partnership (of capital and labour), if a dispute arises as to whether or not profit has been made, the statement of the person supplying the labour is heard, and the owner of the capital must prove that profit has been made" (Article 9). Lastly, it is necessary to indicate that the *Majallah* has an exception to the principle that the burden of proof lies on the claimant. Article 1774 reads: "A trustee (person to whom a thing has been entrusted for safekeeping) making a statement upon oath is worthy of credit".

Thus if a person who has entrusted his property to another for safe-keeping brings an action against that person, who in turn alleges that he has returned the thing entrusted to him, the trustee shall be believed if he swears that he has discharged his obligation. This provision is contrary to the general rule because the person to whom the thing was entrusted is making a claim contrary to the apparent fact and by analogy should be asked to prove his claim that he had returned the trust. The majority of Muslim jurists have accepted this exception. Only the Maliki's did not, except where the thing entrusted was deposited with the trustee without accompanying evidence of deposit in the first place. However, if the thing entrusted was deposited with accompanying evidence and the trustee subsequently alleged its return, it is a duty to prove that he had.¹⁷

¹⁵ Guzelhisari, *Ibid.*, p.26. This rule has other application such as "the limitation of time" (*taqadum*) and others.

¹⁶ Ibn Nujaym, *Ashbah*, p.25.

¹⁷ Ibn Rushd, *Bidayat*, II, p.57.

2. Precedence of Evidence

Since it is established that a defendant is presumed to be free from liability until the claimant proves the contrary, it is important to know who is the defendant and who is the plaintiff, who of the two must bear the onus of proof, and whose evidence takes precedence in case of conflict. It is called precedence of evidence. The *Majallah* has given several examples to demonstrate it. One example will suffice to illustrate the point. If A claims that the thing in B's hand is his property and the latter disputes his claim, upon whom should the burden of proof fall? The *Majallah* states, "In an action for absolute ownership the evidence of the person not in possession is preferred" (Article 1757).

It means that the person who does not hold the disputed property should prove that he is the owner because ownership belongs to the person who owns the property. It is the view of the Hanafi school and, according to one version, of the Imam Ahmad Ibn Hanbal. However, the Imam Ahmad Ibn Hanbal according to another version, and the Imams Malik and al-Shafi' i held that the evidence of the person in possession takes precedence.¹⁸ The maxims of the *Majallah* include a principle concerning precedence of evidence: ¹⁹ It is a fundamental principle that any new event shall be regarded as happening at the time nearest to the present. That is to say, if a dispute arises regarding the cause of some new event and the time at which it occurred, such event shall be considered concerning the time nearest to the present unless it is proved that it relates to a more remote period" (Article 11).

Accordingly, "evidence given as to good health is preferred to evidence as to a mortal sickness. Example: A makes a gift to one of his' heirs and dies. Another heir alleges that the gift was made during a mortal sickness. The person in whose favour the gift was made alleges that the gift was made while in good health. The evidence of the person in whose favour the gift was made is preferred." (Article 1766). In other words, the person in whose favour the gift is made has to prove his contention. If he fails, the gift would be considered to have been given in the course of mortal sickness, i.e., the time nearest to the present. In this case, it would only acquire validity if ratified by the other heirs by Article 879.²⁰

Of course, pertains to cases in which the reason for precedence of evidence is clear. In other cases, if that of another should oppose the evidence of one party, one of three courses may be resorted to: both of them may be rejected, each may negate the other, and finally, one of them may

¹⁸ Dimashni, *Rahmat* II, p.205.

¹⁹ Suyuti, *Ashbah*, p.43.

²⁰ This rule has exceptions in the Hanafi School ; see Ibn Nujaym, *Ashbah*, Guzelhisari, *Manafi*, p.331.

take precedence using a lottery.²¹ Schools differed on these and other similar details. A study of Islamic works on jurisprudence shows that the principle of precedence of evidence is derived from the maxim: "The burden of proof lies on him who alleges". However, the jurists over the ages produced lengthy and detailed discussions on the subject. It gave rise to a collection of rules, which were handed down from one generation to another until they found their way into the *Majallah*. The outcome was the creation of complicated rules which somewhat limit the freedom of the judge in his inquiry into cases. If the judge had merely been limited by the tradition of the Prophet ' (The burden of proof is on him who alleges) without the subsequent details and complications, and if the enforcement of this tradition had been left to the discretion of the judge, the result would have been more consonant with the spirit of the *Sunnah*, and justice would have been better served. The principal means of establishing a fact are three: admission, evidence and oath. We shall briefly explain each one of these, confining our discussion to general principles.²²

3. Admission And Confession

a. The Effect of Admission and Confession

The strongest proof for the establishment of the plaintiff's claim is the admission by the defendant of the matter claimed. Article 79 of the *Majallah* states, "His admission binds a person".²³ It conforms with the *Quranic* provision: "O ye who believe! Be ye staunch in justice, witnesses for Allah, even though it be against yourself." (Holy *Quran* 4: 134). A tradition of the Prophet (PBUH) states, "Speak the truth even though it is against yourself".²⁴ It is a prerequisite for a valid admission that the person making it should be of sound mind, free from duress and interdiction, and should have attained legal adult age (majority). Hence, admissions made by minors, lunatics or other interdicted persons and those made under duress are not valid.

When a defendant makes an admission, he is not entitled to retract it if such admission pertains to the rights of other individuals. It is not applicable in *hudud* or questions relating to the rights of Allah (public rights), i.e., in penal matters where no rights of other individuals are involved, as in the case of the adulterer and the drunkard. In this second category of rights, a person may retract his admission in conformity with a tradition of the

²¹ Ibn Rajab, *Qawaid*, pp.363-64.

²² Refer to Books 13 and 15 of the *Majallah*.

²³ Guzelhisari, *Manafi*, p.331

²⁴This is the latter part of a tradition mentioned by Suyuti in *Jami Saghir* No. 5004, on the authority of Ibn al-Najjar.

Prophet, which says, "Set aside punishment when there is a doubt".²⁵ Several jurists, however, including the followers of the al-Zahiri school took exception to this rule on the ground that the tradition mentioned above was not authentic in that it was reported only as a saying of Ibn Masud and `Umar.²⁶ Moreover, admission on behalf of another person is not valid.²⁷ This means that admission binds only the person making it, unlike the force of evidence, which extends to third persons. The *Majallah* says,²⁸ "Evidence is an absolute proof in that it affects third persons; admission is a relative proof in that it affects only the person making such admission" (Article 78) For example, if there were several defendants in a case of debt, and if some of them admit the debt while the rest deny it, admission will bind only those who made it. However, if the plaintiff should prove his claim by evidence, such proof would be binding upon all.

Admission may sometimes be complete and entirely consistent with the claim; at other times it may be qualified or compound. The qualified admission is that in which the defendant concedes the claim of the plaintiff but attaches to his admission an additional statement which alters its connotation. An example would be for a person to admit his indebtedness but to add that the debt was not yet due. The compound admission is that in which a defendant admits the original fact (upon which the claim rests) but adds to such a fact another one closely tied to it, as where a defendant admits a debt but adds that he has paid it off or that the plaintiff released him of it. In such cases, should the defendant's admission be accepted in *toto*, or should it be divided into two parts with the result that he becomes bound by the debt and a duty devolves upon him to prove what he added to his admission?

There are two points of view regarding this question. The first is that of the Hanafi and the Maliki schools²⁹ which accepts the division of admission. According to this view, the defendant becomes bound by the debt, and a duty devolves upon him to prove what he added to the admission. The second view disapproves of the division of admission because it considers it an indivisible whole. Thus if a defendant admits that he owes a sum of money but payable at a future date, he would not be made to pay it off before that date, because, as Ibn Qayyim I-Jawziyah says, "The defendant has made his admission on the basis of future maturity of the debt; to make him bound by it on any other basis is to make him bound by that which he has not admitted". Hammad ibn Salamah (d. 784-5 A.D.) relates a case in which a

²⁵ Suyuti, *Ashbah*, p.84.

²⁶ Ibn Ilazm, *Muhalla*, VIII, pp.252-53.

²⁷ Guzelhiari, *Manafi*, p.313.

²⁸ Ibn Nujaynn, *Ashbah*, p.101.

²⁹ Kasani, *Bada i*, VII, p.208.

man claimed the sum of 1,000 dirhams from another but without being able to produce evidence. The two men were brought before the judge of Basra, Abd al-Malik Ibn Yala, after that the defendant admitted the debt but added that he had settled it. The plaintiff seized upon the admission of debt to the exclusion of the defendant's statement as to settlement. Abd al-Malik held: "The admission may either be upheld in its entirety or discarded in its entirety".

The Zahiri school accepted the principle of the indivisibility of admission,³⁰ and by the dominant opinion in the Hanbali school. It has also been accepted by most modern codes such as the Lebanese Code of Civil Procedure (Articles 226, 227) and the Lebanese Law on the Reorganization of *Shariah* Courts (Article 44). It is evident that this principle is sound and just. The following example explains it further: Suppose that a creditor who has been repaid makes a second claim for his money. Neither has the evidence to prove the original debt nor has the debtor evidence to show that he paid it back. If the debtor admits the debt, but with a statement that he has settled it, his admission should be considered in *toto*.

For if it was proper to divide the admission, the debtor would be forced to pay back the same debt a second time because of his inability to prove the previous settlement, whereas if he had lied and had denied the entire claim the case would have been turned down because of the plaintiff's inability to prove it. Thus the division of admission in a case like this would encourage liars and would penalise the truthful. There is no consensus in the Shafie school regarding this rule. The Imam al-Ghazzali held that admission would not be divisible if the defendant admitted the debt but claimed that payment was only due on a future date, while it would be divisible if he admitted the debt but claimed its settlement.³¹

4. Testimony of A Witness

a. Acceptance of Testimony

Al Bayyinah (evidence) in the linguistic sense means evident or obvious. In law, it has been used to connote "strong proof" (Article 1676 the *Majallah*) because it makes the truth evident and obvious. Evidence in modern times is of two types written and personal. In the Islamic works on jurisprudence, it is usually used to connote the second type only, i.e., the testimony of witnesses. Personal evidence (testimony) has not been accepted in the various legal systems without hesitation and limitations. The reason for this reluctance is the forgetfulness of witnesses, their suppression of

³⁰ Ibn Qudamah *Muwaffaq*), *Mughni*, V 285.

³¹ Rafi, *Fath* XI, p.192.

evidence or willful distortion of facts resulting from partiality, incitement or bribery. Hence, laws have been very stringent in accepting testimony. Several legal systems have excluded such testimony in civil matters except in special cases. Other systems accepted testimony in all circumstances but required a minimum number of witnesses. Most modern legal systems, while accepting testimony without reservation in penal matters, reject it in civil transactions except in special circumstances. In the Lebanese Code of Civil Procedure, for instance, testimony is not considered sufficient to disprove the contents of a written document.

Moreover, it is not acceptable in cases involving more than 55 Lebanese pounds,³² except in very restricted and exceptional circumstances.³³ In Islamic jurisprudence, however, the dominant opinion among the majority of jurists has sanctioned testimony in all cases but has determined the minimum number of witnesses required. This number differs according to the different schools and types of cases. Despite this reservation, jurists have explained that the specification of the number of witnesses is a matter contrary to analogy because the determination of the truth depends upon the trustworthiness of witnesses and not upon their number.³⁴

b. Categories of testimony

First - The testimony of four. The various schools are in agreement that the number of witnesses required in a case of adultery is four men. The *Quran* refers to four witnesses in the following verses: "And those who accuse honourable women but bring not four witnesses, scourge them with eighty stripes" (*Quran* 24: 4); "Why did they not produce four witnesses? Since they produce not witnesses, they verily are liars in the sight of God" (*Quran* 24:13); and "As for those of your women who are guilty of lewdness, call to witness four of you against them" (*Quran* 4: 15).

The reason for stringency in such cases stems from the desire to shield women against unwarranted accusations. The testimony of women in such cases is not accepted, but according to Ata' (Ibn Abi Rabah d. 732-3 A.D.) and Hammad (Ibn Salamah) the testimony of three men and two women in a case of adultery may be enough. The Zahiri School equalised the testimony of two women to that of one man and thus provided that the testimony of eight women may be accepted in a case of adultery.³⁵ Al-Hasan al-Basri (d. 728 A.D.) held that in murder as in adultery the testimony of four persons is

³²Lebanese Code of Civil Procedure, Articles 53 and 241. The amount was 10 Ottoman gold pounds according to Article 80 of the Ottoman Code of Civil Procedure. See also Article 1341 of the French Civil Code.

³³Article 242 of the Lebanese Code of Civil Procedure.

³⁴Zayla I, *Tabyin*, IV, p.212.

³⁵Ibn Qudamah (*Muwaffaq*) 275, *Mughni*, X, 75; and Ibn Ilazm, *Muhalla*, IX, p.395.

required.³⁶ Second— he testimony of three The Imam Ahmad Ibn Hanbal said that if a person known for his riches should plead poverty three witnesses would be needed to corroborate his statement.³⁷

Third –The testimony of two men without a woman. Such testimony is sufficient in all other cases according to all schools, provided the two witnesses are legally competent to give testimony. The Quran and traditions provide for such testimony. In matters of testamentary disposition and divorce, the *Quran* says, "O ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at-the-time of bequest two witnesses, just men from among you or two others" (*Quran* 5: 106); and "Then when they have reached their term, take them back in kindness or part from them in kindness and call to witness two just men among you, and keep your testimony upright for Allah" (*Quran* 65:2).

The testimony of two just men is necessary according to all jurists in all penal matters with an unalterably fixed punishment (*hudud*) save in adultery. According to Malik and Ibn Hanbal, it is also necessary, in all non-property matters where men can have knowledge of the necessary information such as marriage, divorce and similar matters. The testimony of women in all these matters is unacceptable (except according to `Ata', Hammad and the Zahiri school as mentioned earlier).³⁸ Fourth - The testimony of two men or one man and two women is that mentioned by the *Quran* in connection with the written evidence of a postponed debt; "And call to witness from among your men two witnesses. And if two men were not at hand then a man and two women (*Quran* 2: 282). All the Islamic schools are in agreement concerning acceptance of this testimony in cases involving property such as sale, loan, wrongful appropriation, and all kinds of debts. The Hanafi school has even accepted it in all other matters about private rights, i.e., in all civil matters whether they relate to property or other matters as marriage and divorce. It is not, however, acceptable in questions relating to the rights of God, i.e., Penal matters with an unalterably fixed punishment. The *Majallah* in Article 1685 accepts this testimony. The Zahiri school accepts this testimony in all cases involving private rights and in cases relating to the public (God's) rights exception adultery.³⁹

Fifth - The testimony of one man, and the oath of the plaintiff. This type of testimony was not acceptable to the Hanafi school, nor to the Imam al-Awzaie, nor al-Layth (ibn Saad d. 791 A.D.), one of the followers of Imam Malik. It is, however, accepted in all cases involving property, according to the other Imams, who base their acceptance on the *Sunnah*.

³⁶ Ibn Qudamah (*Muwaffaq*) p.275.

³⁷ Ibn Qayyim, *Turuq*, p.144:

³⁸ Ibn Rushd, *idayah* 385.

³⁹ For all this see the references mentioned in the preceding footnote.

According to one tradition, the Prophet gave judgment based on the testimony of one witness endorsed by the oath of the plaintiff in support of his claim.⁴⁰ The Caliphs Abu Bakr, `Ali ibn Abi Talib and `Umar [SEP] ibn `Abd al-`Aziz are also reported to have accepted this procedure.

The opponents of this type of testimony have countered: that the *Quran's* stipulation for testimony is two men or one man and two women; that the tradition to the effect that the Prophet had accepted the testimony of one man endorsed by the oath of the plaintiff is substantiated by the authority of one narrator only; and that such a tradition cannot abrogate the text of the *Quran*.

c. The Testimony of a Woman

It is an accepted social fact that women are less experienced than men in matters of practical life. It has been the case since the ancient days. Some legal systems did not accept the testimony of women at all, such as the Jewish law;⁴¹ where it was accepted, there were certain reservations. For example, the legal codes of some of the Swiss cantons, until the beginning of the 19th century, regarded the testimony of two women as equivalent to the testimony of one man, and similarly, in the old French law, the testimony of a woman was not accepted as equal to that of a man.⁴²

Even the Code of Napoleon, before it was amended in the latter part of the 19th century, excluded the testimony of women in testamentary dispositions and several transactions about personal status.⁴³ In addition to her lack of practical experience, the Arab woman was customarily secluded from men. The *Shariah* took cognizance of this fact and accepted the testimony of women only in matters where women could be expected to know necessary information. In economic transactions, where women are usually less informed than men, a woman's testimony was considered as equivalent to half that of a man. Thus, the Koran, in the course of urging that debts which mature in future should be written down, states: "And if two men be not at hand then a man and two women of such as ye approve as witnesses, so that if the one erred, through forgetfulness, the other will remember" (*Quran* 2: 282).

This constituted considerable progress in comparison with the status of women during the pre-Islamic era where a female child was in danger of

⁴⁰ Reported by Malik in *Muwatta* (see Suyuti, *Tanzwir*, II, 108); Shafic in his *Musnad* (see Shafie, *Kitab al-Umm*, VI, 56) Muslim in *Sahih*, V, p. 28; Ibn Hanbal; as well as the writers of the four *Sunan* books, Daraquṭni, and others, p.104.

⁴¹ Sabri, *Muqaranat*, Article 51.

⁴² See these, examples and others in Alfred Thabit's thesis, *La preuve testimoniale en droit ottoman*, (Lyons, 927), pp. 9-31.

⁴³ Articles 37 and 980 before they were amended by the law of 7 December 1897.

being buried alive and was denied many civil rights including inheritance — the differences between the various schools concerning the testimony of women if in the company of men. The conditions wherein the testimony of women alone may be considered. A tradition of the Prophet (PBUH) reads, "The testimony of women is permissible in matters to which men have no access".⁴⁴ All the schools accept this principle. The *Majallah* says, "In places where males cannot be possessed of the necessary information, the evidence of females alone will be accepted in respect of property" (Article 1685). These matters include birth, female defects, etc. They also include lactation in most schools, excluding the Hanafi. There has been some controversy over the number of women witnesses in such matters. The Hanafi and the Hanbali schools have held that the testimony of one woman is sufficient.

They based their ruling on a tradition of the Prophet to the effect that he had accepted the testimony of a midwife concerning a question of birth,⁴⁵ and on the fact that the Caliph `Ali and al-Qadi Shurayh were reported to have followed suit. The number of women witnesses according to the other scholars varies; in the view of Imam Malik two are required by analogy with what constitutes a sufficient number of male witnesses.⁴⁶ According to `Uthman al-Batti three women witnesses are necessary, and according to al-Shafie four are required.⁴⁷ Now in cases other than those where males could not be expected to possess the necessary information, would the testimony of women alone be acceptable? Imam Malik held that the testimony of two women with the oath of the plaintiff in cases involving property would be adequate. It is also by one opinion of the Hanbali school. The Caliphs Umar and Ali and al-Qadi Shurayh are reported to have accepted the testimony of four women in cases of divorce, dowry and other similar cases. The testimony of women according to the Zahiri school, as pointed out earlier, is acceptable in all cases provided the testimony of two women is considered as equivalent to that of one man.⁴⁸

d. The testimony of a man

As pointed out earlier the testimony of one man, if supported by the oath of the plaintiff, is acceptable in all cases involving property, according to several imams. But such testimony is not acceptable without the oath of the plaintiff. The reason stems from the fear of false testimony and the desire for the safeguarding of people's rights and property. This was the same reason

⁴⁴ Zaylai, *Tabyin*, IV, p.209.

⁴⁵ *Ibid*.

⁴⁶ For exceptions see Ibn Farhun, *Tabsirat*, I, p.240.

⁴⁷ Shafici, Musnad; see his *Kitab al-Umm*, VI, p.253.

⁴⁸ Ibn Jazzi, *Qawanin*, 310; Ibn Hazm, *Muhalla*, IX, 397 ff.; Ibn Qudamah, *Muwaffaq*, *Mughni*, XII, 15; and Ibn Qayyim, *Turuq*, pp. 37 and 141.

which also prompted several ancient legal systems such as the Roman law,⁴⁹ Canon ^[11]_[SEP]law, and the old French law,⁵⁰ not to be satisfied with the testimony of one man or, if accepted, then not without reservations.

This consideration is also behind the rejection of testimony by many modern codes in civil matters except in special circumstances, and their insistence on having more than one witness in important cases. For example, English law insists on having at least two witnesses to prove the crime of high treason.⁵¹

The Hanafi school amongst others accepted the testimony of one man in exceptional cases. For example, sole testimony is permissible in cases of birth where the testimony of a woman alone is adequate.⁵² Also, the testimony of the teacher alone is sufficient in cases of juvenile delinquency.

Similarly, the testimony of one expert is permissible for the assessment of damage to property. Individual testimony is also permissible for recommending or taking exception to the trustworthiness of witnesses, for serving notice about the removal of an agent, or about the defects in the object of a sale, and other similar matters.⁵³ These include the statements of an interpreter upon whom a judge may depend in the translation of the statements of either of the two parties or in cases where the witnesses are not familiar with the official language of the court. Thus the *Majallah* says,⁵⁴ "The word of an interpreter is accepted in every respect" (Article 71). The translation of one trustworthy interpreter is sufficient according to the Imams Abu Hanifah, Abu Yusuf and Malik. But in the opinion of Muhammad (al-Shaybani), and others the translation, like the testimony of one man, is not sufficient.⁵⁵

However, the Hanafi jurists have pointed out that in those cases in, which the testimony of one man is not acceptable, the specification of a larger number is a matter contrary to analogy, because the discovery of truth depends upon the trustworthiness of witnesses and not upon their number.⁵⁶ Therefore, they do not attach much weight to a great number of witnesses in the evaluation of evidence. For this reason, circumstantial evidence has been

⁴⁹ "Ut unus testimonium nemo iudicui in quaecumque causa facile patiatur admitti"; Digest, D. liv. XXII, tit. fr. 2; and Codex, C. IV, tit. 01

⁵⁰ Cf. the Latin proverb, "Testis unus testis nullus." See Planiol, *Traite*, TT, No. 105; Thabit's thesis, op. cit., I lo; Pothier, *Oblig.*, No. 83; and Bonnier, 30R ff.

⁵¹ Harris, *Principles*, p. 36.

⁵² Zaylai, *Loc. Cit.*

⁵³ Ibn Wahban in *Manzumut*, 61, mentions eleven instances. Ibn Nujaym in *Ashbah*, 88, adds one more instance. Ali Hayder in his commentary on Article 1825 of the *Majallah* mentions fifteen instances based on Abu al-Su'ud. For similar cases in the Maliki School see Ibn Farhun, *Tabsirat*, I, 231 ff.

⁵⁴ Ibn Nujaym, *Asbah*, 51.

⁵⁵ For the details see Qadikhan, *Fatawa*, II, 378; Ayni, *Umdat*, XXIV, 266; Shawkani, *Nayl*, VIII, 234; and Ibn Farhun, *Tabsirat*, I, p. 237.

⁵⁶ Zaylai, *Tabyin*, IV, p. 212.

accepted in many cases.

Lastly, it is necessary to point out that there were Muslim jurists who were satisfied with the testimony of only one truthful witness. One of them was Ibn Qayyim al Jawziah who said, "Everything which brings out the truth constitutes evidence. Neither God nor His Prophet disregarded a right after it had been established by any means. That which was prescribed by God and His Prophet is that once the truth has come out by whatever method, it should be implemented and endorsed and may not be annulled or suspended".⁵⁷ Following up his argument Ibn Qayyim al-Jawziah says, "A judge may give judgment in cases other than those involving the rights of God on the testimony of one man whose integrity is established. God did not make it a duty for judges not to give judgment save on the testimony of two witnesses, but merely ordered the owner of a right to safeguard his rights by two male witnesses or one man and two women. It does not mean that a judge may not give judgment on any lesser testimony.

The Prophet gave judgment based on one witness and an oath and even based on one testimony only".⁵⁸ In other words, "the methods by which a judge gives judgment are of greater attitude than those through which God has guided the owner of a right to safeguard it".⁵⁹ Ibn Qayyim al-Jawziah referred in his contention to a statement by Ibn Taymiyah to the effect that the *Quran* makes no mention of the testimony of two male witnesses or one male witness and two females concerning the procedure by which a judge arrives at a judgment, and that the *Quran* merely mentioned this procedure in connection with a person's endeavour to safeguard his right.⁶⁰ Ibn Qayyim al-Jawziah based his contention on a tradition in which the Prophet approved the sole testimony of a Bedouin about sighting the crescent moon which signals the beginning of Ramadan fasting. He is also reported to have accepted a sole testimony in a case of robbery and to have accepted the sole testimony of a woman in a case where only women can know the necessary information. He is also reported to have considered the testimony of Khuzaymah, a man of unassailable integrity, as equivalent to two, saying, "It is sufficient unto a person to have Khuzaymah as a witness".⁶¹

This last tradition upon which the Hanafi school based their argument that "what has been proved contrary to analogy should not be used for further analogy" was construed by Ibn al-Qayyim as evidence that the acceptance of one witness "is not a special privilege for Khuzaymah to the exclusion of other Companions who were equal to, if not better than him. If

⁵⁷Ibn Qayyim, *Islam*, I, pp.192-93.

⁵⁸Ibn Qayyim, *Turuq*, pp.66-67.

⁵⁹Ibn Qayyim, *Islam*, I, p.81.

⁶⁰Ibn Qayyim, *Turuq*, p.70.

⁶¹ The sources of this tradition have been previously mentioned. See Part III, footnote 76.

Abu Bakr, Umar, Uthman, Ali or Ubayy ibn Ka'b had given testimony, any one of their testimonies would be more entitled to such privileged consideration". In other words, Ibn al-Qayyim interprets the tradition as having been based on a cause, namely the integrity and truthfulness of Khuzaymah. Therefore, a judge may, by analogy, accept the testimony of any single witness if his truthfulness is established. The tradition thus does not conflict with the Koran, and like other parts of the Sunnah, serves to "interpret it, explain it and qualify its absolutes". Several famous Muslim judges like Shurayh and Zurarah ibn abiAwfa had accepted this latter interpretation and had given effect to it in their rulings. Abu Da'ud in *al-Sunnah* and Iyas ibnMuawiyah1(d.122 A.H.) also ruled likewise.⁶²

5. The Condition of Trustworthiness

In addition to the number of witnesses required, there are prerequisites of trustworthiness to which a witness must conform. Thus, the testimony of a person who is notorious for lying or for the bad character is unacceptable and some schools, as well as the *Majallah*, make it a requirement to investigate the uprightness of witnesses both publicly and privately.⁶³ Further, the testimony of a witness is unacceptable if an enmity exists between him and the party against whom the testimony is to be given. Nor is it acceptable where prospective benefit or avoiding of loss may be involved such as in situations where there are blood relationships, or relationships of employment, partnership, surety-ship and the like. For example, the testimony of a father in favour of his son or vice versa is not admissible, but it may be utilised if the testimony of the one is against the other.

Similarly, the testimony of one spouse against the other is admissible, but not if it is in favour of him or her, except in the Shafi'i school.⁶⁴ However, the prerequisites for trustworthiness should be viewed in a relative sense, i.e., in the light of the witness's environment and background. Thus, some Maliki jurists have accepted the testimony of non-trustworthy witnesses in cases of necessity and the testimony of a person of unknown trustworthiness in minor cases.⁶⁵

6. Administering the oath to the witness

There are two views in the *Shari'ah* concerning the administering of oath

⁶² Ibn Qutaybah, *Ma'arif*, 207; and Ibn Khallikan, *Wafayat*, I, pp. 81-82.

⁶³ See Article 1716 f f. For investigating the uprightness of witnesses, Abu Hanifah requires that the person against whom the testimony is made should have a chance to question the trustworthiness of such witnesses.

⁶⁴ Nawawi, *Minhaj*, p.135.

⁶⁵ Ibn Qayyim, *Turuq*, 125; Ibn Abidin, *Qurrat Uyun al-Akhyar* (the continuation of Radd), I, 73; Kharashi, *Sharh*, V, 187; and Ibn Hazm, *Muhalla*, IX, 379, No. 1783.

to a witness. The first maintains that no oath need be required because the word testimony (*shahadah*) implies an oath. It is the opinion of the Hanafi school. The second view requires the administering of the oath because it maintains that the trustworthiness of witnesses has become in doubt and should be reinforced by oath. The Imam Ibn Abi Layla and Muhammad ibn Bashir, Judge of Cordova, and other early prominent judges adopted this view; the Hanafi jurist Ibn Nujaym and the well-known Hanbali Imam Ibn Qayyim al-Jawziyah also adopted it, the latter saying: "If a judge is entitled to separate between witnesses if his suspicion were to be aroused as to their veracity, it would be even more proper in that case to put them to the oath".

Similarly, in the Maliki school, the judge may put a witness to the oath in case of suspicion.⁶⁶

The *Majallah* accepted this requirement. Article 1727 reads: "Should the person against whom evidence is given ask the court, before giving judgment, to put the witnesses on their oath that their evidence is not false, the court may, if it deems necessary, strengthen its evidence by administering the oath. The court may inform the witnesses that their evidence will not be accepted unless they swear the oath". Modern codes have on the whole called for administering the oath to the witness before he gives his testimony. Thus the Lebanese Code of Civil Procedure provides that "a witness, before giving testimony, must take an oath that he says the whole truth and nothing but the truth" (Article 272).⁶⁷

7. A plurality of witnesses and general hearsay

According to the majority of jurists, if two sets of testimonies should conflict, preference need not be given based on the number of witnesses on each side.⁶⁸ The *Majallah* says, "No importance is paid to the mere number of witnesses; that is to say, if one of the parties has more witnesses than the other, he will not be preferred for that reason alone. If the number of witnesses, however, is so large (*tawatur*) that they conclusively substantiate the evidence, they will be preferred" (Article 1732). The *Majallah*, further, defines the conclusively substantiated evidence (*tawatur*) as: "Statements made by several persons where it would be contrary to reason to conclude that they had agreed to tell a lie" (Article 1676).

⁶⁶ Ibn Farhun, *Tabsirat*, II, p.21.

⁶⁷ See also Article 9 of the *Shar'i* Courts Organization Law, issued by legislative decree No.241 of 4 November 1942, as amended by a decree passed on 4 December 1946, which required courts following the *sunni* schools to make the witness take the oath before giving his testimony, and left the choice to do that for the Jafari (*Shi'ah*) courts.

⁶⁸ Preference on the basis of the comparative trustworthiness of witnesses is accepted only in the Maliki School. See Dimnashqi, *Rahmat*, II, 06; Ibn Jazzi, *Qawanin*, 02; Ibn Malak, *Sharh*, 33; Nawawi, *Minhaj*, 139; and Ibn Qudamah (Muwaffaq), *Mughni*, XII, 176; and Tasuli, *Bahjah*, I, 45.

Such statements are the strongest type of evidence according to the jurists, even stronger than the testimony of two witnesses.⁶⁹ The *Majallah* states that "conclusively substantiated evidence is tantamount to positive knowledge, and no evidence is entertained contrary to it" (Article 1733). It is a condition that its object is probably physically and rationally so that real certainty may be established. There is a controversy, however, about the number of witnesses required. The *Majallah* has adopted the dominant view, which makes no provisions as to numbers. It states, "No definite number of persons is necessary to constitute conclusively substantiated evidence (*tawatur*).

Their number must be so considerable, however, that it would be contrary to reason to conclude that they had agreed to tell a lie" (Article 1735). The determination of their number, thus, was left to the discretion of the judge, which became a cause for controversy. The Advisory (Fatwa) Department of the Ottoman Masheikh (Islamic Council) stated that the number of witnesses should not be less than twenty⁷⁰, but the Ottoman Court of Cassation held that the number should not be less than twenty-five.⁷¹ The *Majallah* provision was misused in fact until it was abrogated in Syria and Lebanon by an ordinance of the French Commissariat in 1926.⁷² Such conclusively substantiated evidence is not known to modern laws in a sense we mentioned, namely, that it emanated from persons whose number is sufficient to establish positive knowledge. However, modern laws comprise similar provisions, namely the acceptance of evidence-based upon rumours and hearsay but such evidence is only acceptable on rare occasions.⁷³

For example, Article 252 of the Lebanese Code of Civil Procedure provides: "Evidence based on hearsay is not acceptable save in exceptional circumstances where the law provides for the acceptance of this evidence as a punishment for negligence or malicious intention". Similarly, the Maliki school considers evidence based-on hearsay sufficient in various instances and provides that two witnesses are adequate in establishing it.⁷⁴

8. Evaluation of Evidence

Is a judge entitled to evaluate the testimony presented to him, or is he

⁶⁹ Ibn Qayyim, *Turuq*, p.180.

⁷⁰ As mentioned by Ali Haydar in his commentary on Article 735 of the *Majallah*.

⁷¹ See the decision issued on 3 September Financial year) 309, in the Turkish journal *Mahakim*, No.53, p. II172.

⁷² Decision No. 2 of 9 January 1926, published in the Lebanese official Gazette, No.1952 of 5 March 1926.

⁷³ For example, Articles 415, 442, and 504 of the French Civil Code. See also Bonnier, *Op.Cit.*, p.20 ff.

⁷⁴ Kharashi, *Sharh*, V, p.12.

duty bound to give judgment by it? There are two views on the subject. The first holds that a judge, after hearing the witnesses, should give judgment by their testimony without hesitation or evaluation. Such was the stand taken by several legal systems such as the French law in the 18th century and the old Austrian Code of Civil Procedure.⁷⁵ The second view regards testimony as no more than a means for investigating and establishing the truth. Therefore, a judge is entitled to evaluate it and to assess its trustworthiness in his conscience so that if he is convinced of its authenticity, he will give judgment accordance with it, and if he were not convinced, he would reject it. It is the view of most modern codes; for example, Article 278 of the Lebanese Code of Civil Procedure states: "The court which hears the facts is the one to evaluate the worth of testimonies, and its evaluation is final".⁷⁶ The same right of evaluation is given to the judge by the Lebanese *Shariah* Courts Organization Law.⁷⁷

The *shariah* adopted a middle course. Like the first view, it regards testimony as binding upon a judge; he may not postpone pronouncing judgment after hearing it except to bring about an amicable settlement or unless requested to delay judgment by the plaintiff. The *shariah*, however, embodies safeguards to ensure that testimonies be truthful to the greatest possible extent. Several prerequisites were laid down for acceptance of testimony including the trustworthiness of witnesses, as we have already seen. This stipulation of trustworthiness gave the judges wide latitude in rejecting witnesses for the reason of bad character or undependability. Most of the schools made it a condition that a judge ascertains both secretly and publicly the integrity of witnesses.

Thus, the *Majallah* says, "The inquiry as to the credibility of witnesses shall be addressed either publicly or privately to the person having authority over such witnesses. Thus, if the witnesses are students, the inquiry shall be addressed to the teacher of the school in which they are carrying on their studies, if a merchant, from reliable persons who are also merchants . . . " (Article 1717). The Ottoman *Mashyakhah* (Islamic Council) and the Department of Fatwa ordered that the *shariah* judges when in doubt about the veracity of witnesses, should themselves investigate their background and should not be satisfied with the usual public and private inquiry.⁷⁸ At the same time, some Muslim jurists adopted the second view. They maintained that to make a judge bound by the testimony is contrary to analogy because

⁷⁵ Bonnier, 303 ff.

⁷⁶ Adopted in Jordan as the Evidence Amendment Law of 1928, published in the official Gazette, No. 211 of 6 December 1928.

⁷⁷ *Shariah* Courts Organization Law, Article 92, amended on 4 December 1946.

⁷⁸ This order was issued on 28 Jumada I, 1332 A.H., corresponding to 9 April (financial year) 1330, (1914 A.D.), published in *al-Jaridah al-Ilmiyah*, No. 1, p. 36.

testimony is information, which is liable to be right or wrong. Some of them such as Ibn Qayyim al-Jawziyah went so far as to say that a judge should arrive at the truth by any means at his disposal, even by the sole testimony of a truthful man, and that testimony is no more than a way to attain the truth, which must be upheld. Ibn Nujaym in *Al-Ashbah wa al-Naza'ir* declared that a judge might postpone judgment if he entertains any doubt.⁷⁹ This procedure affords the just judge a practical and wise method to evaluate a testimony so that if its authenticity is established for him and his conscience is satisfied; he could give judgment in accordance in addition to that. If, on the other hand, there is any doubt in his mind, he may turn it down so that he could be certain that he was performing his duty as required by the Quran: "If ye judge between mankind that ye judge justly" (*Quran* 4: 58).

9. Counter testimony

One last question: Is the defendant entitled to present counter-evidence to disprove the evidence of the plaintiff? If a defendant can produce evidence with which to disprove the claims of the plaintiff and to establish his non-liability,⁸⁰ he may present such evidence in the view of all jurists. However, if he has no such evidence, he is still entitled to dispute the trustworthiness of the plaintiff's witnesses by submitting evidence to that effect.⁸¹ Most modern legal systems have gone even further than that by permitting a defendant in all circumstances to submit counter-evidence. Thus Article 255 of the Lebanese Code of Civil Procedure states: "It is not necessary that the decision (which orders the hearing of witnesses) should specifically permit a defendant to summon counter witnesses because every investigation must of necessity permit counter investigation". Furthermore, the inquiry as to the integrity of witnesses is no longer necessary. Whereas such inquiry was necessary according to the *Majallah* (Article 1716), it was left to the discretion of the judge according to a Lebanese law issued on May 29, 1929.

Finally, such inquiry was abolished altogether by Article 278 of the Lebanese Code of Civil Procedure, and a judge is, therefore, unequivocally restrained from resorting to it.

10. The Oath (*Al-Yamin*)

⁷⁹ See Ibn Qadi Samawah, *Jami'*, I, 16; Ibn Nujaym, *Ashbah*, 89; and Ibn Qayyim, *Turuq*, 180.

⁸⁰ This applies in actions for debt or actions pertaining to contracts whose subject matter is a specific thing. Ibn Rushd, *Bidayat*, II, 91; and Mawwaq, *Taj*, VI 213.

⁸¹ Article 1724 of the *Majallah*, and Adawi, *Hashiyah*, V, p.159.

a. Tendering the oath

We have stated that the legal methods of proof are an admission, testimony, an oath. If a person brings an action against another, and the latter denies the claim, the plaintiff must present evidence. If he fails, he may ask that the defendant is required to deny the claim under oath; otherwise, the plaintiff's claim would be rejected. A tradition reveals that the Prophet once asked a plaintiff, "Do you possess evidence?" The plaintiff replied in the negative, after that the Prophet said to him, "You may ask for his (defendant's) oath". The plaintiff replied, "He readily swears and does not care". The Prophet said, "You have nought but these: your two witnesses or the defendant's oath".⁸² An oath may only be sworn in the name of God according to a tradition, which reads: "He who swears must swear by no other than God".⁸³ The oath has been sanctioned in cases involving property and chattels but is not acceptable in penal matters involving public (God's) rights. In other matters, opinions differ as to its acceptability. If a plaintiff tenders the oath to the defendant, three courses may be followed: the defendant may take the oath, he may refuse to do so, or he may retort the oath to the plaintiff himself.⁸⁴

b. The defendant taking the oath

If a defendant testifies under oath that he is free of the claim advanced, such a claim would be dismissed. There is no controversy on this point; however, the controversy is whether or not to accept testimony after the oath has been taken. In other words, if the plaintiff should offer evidence after the defendant had denied the claim under oath, should such evidence be accepted or not? There are three views on this question. The first maintains that the oath is a weak method of proof, which does not terminate a dispute. Therefore, evidence may be heard even after the defendant had denied the claim under oath. It is explained that evidence is the original method of proof, whereas the oath is the substitute which can be overridden by the original method. The Caliph Umar is reported to have said, "A lying oath is more deserving of rejection than trustworthy evidence". Several jurists of old, including Ibrahim (al-Nakh'i) and Shurayh, and the Hanafi, Shafi'i and Hanbali schools agree on this point. The *Majallah*, however, contains no

⁸² Sarakhshi, *Mabsut*, XVII, 0. Bukhari gives a variant reading; see Ayni, *Umdat*, XIII, 243 and 248.

⁸³ Suyuti, *Jami' Saghir*, No. 9866, on the authority of Nasa'i.

⁸⁴ On this subject see Sarakhshi, *Mabsut*, XVI, 119 and XVII, 29; Kasani, *Bada'i*, VI, 229 ff.; Shafi'i, *Kitab al-Umm*, VII, 34 ff., and 140; Malik, *Mudawwanah*, XIII, 24; Ibn Hazm, *Muhalla*, IX, 371 ff; Ayni, *Umdat*, XIII, 257; Ghazzali, *Wajiz*, II, 265; Ibn Qudamah *Muwaffaq*, *Mughni*, XII, 124 ff; Ibn Qayyim, *Ilam*, III, 344; Ibn Rushd, *Bidayat*, II, 86 ff. ; and Ibn Qayyim, *Turuq*, 117 ff.

explicit provisions concerning this matter, and whenever the question arose, reference was made to the Hanafi works representing the first point of view.⁸⁵ However, such a situation was of a rare occurrence for two reasons. First, putting the defendant under oath, according to Abu Hanifah, is not permissible except when the plaintiff fails to produce evidence.⁸⁶

Secondly, the *Majallah* states, "A plaintiff who has stated that he has no witnesses will not be permitted to say later that he intends to call witnesses. And if he has stated that he intends to call a certain witness and no other, he will not be allowed to call any other witness" (Article 1753).⁸⁷ The Imam Ma'ula has expounded the second view. He permitted a plaintiff to submit evidence in support of his claim after the defendant had testified under oath on condition that the plaintiff was not aware of the existence of his evidence when he asked for the defendant's oath. If on the other hand the plaintiff had known of the evidence and had chosen to put the defendant under oath, and then, after such an oath, had offered to submit such evidence, it would not be acceptable. It is also the view of some Shafi'i jurists including al-Ghazzali. The third and last view considers the oath as decisive in a dispute so that a plaintiff may not give testimony after that.

The argument here is that the oath cancels the right of the plaintiff and no evidence may be presented based on a right already discharged. It is further argued that since truth is presumed on the side of the plaintiff if he should tender evidence so that no denial under oath is presented, then truth also must be presumed on the side of the defendant if he should deny the claim under oath. No further testimony from the plaintiff may be offered after that. The adherents of al-Zahiri school have adopted this point of view. Modern codes have also adopted this theory; for example, Article 1363 of the French Civil Code considers the oath as decisive in the settling of disputes. Most French jurists regard the oath as a kind of judicial contract similar to a settlement binding upon both parties.⁸⁸

Similarly, Article 234 of the Lebanese Code of Civil Procedure states:

⁸⁵ See Ali Haydar's commentary on Article 1842 of the *Majallah*.

⁸⁶ A decision in this respect was adopted by the Ottoman Court of Cassation, No.666 on 12 May (financial year) 1326, (1910 A.D.). See the Turkish journal *Jaridah Adliyah*, No. 13, p. 529. The Imam Abu Yusuf disagreed with this opinion and permitted the plaintiff to require the defendant to make an oath although he (the plaintiff) may have a ready evidence. As regards the Imam Muhammad, al-Khassaf reported that he belonged to the same view as that of Abu Yusuf, while al-Tahawi reported that he belonged to the view of Abu Hanifah. See Nata'ij al-Afkar, being the continuation of Ibn Hammam, *Fath*, VI, pp.153-55.

⁸⁷ This is in agreement with the opinion of the Imam Muhammad, and in disagreement with that of Abu Hanifah. See Ali Haydar in his commentary on Article 1753 of the *Majallah*. Articles 83 and 85 of the Ottoman Law of Civil Procedure required the plaintiff to name his witnesses and fix their numbers.

⁸⁸ Some have criticized this interpretation. See, for example, Glasson, *Traite*, II, No. 696, and III, No. 736.

"If the defendant should take an oath, his opponent may not submit evidence to establish the falsehood of that oath. However, if a penal verdict establishes the falsehood of the oath, the injured party is entitled to claim damages".⁸⁹

c. Defendant's refusal to take the oath and its retortion

If the defendant should refuse to take the oath, would judgment be given against him on the sole basis of his refusal? Or would the plaintiff then be asked to take the oath? There has been some controversy over this issue. According to the Hanafi school and the Imam Ahmad ibn Hanbal, in one reported version, "refusal is tantamount to admission". If a defendant refused to take the oath, he would be regarded as having admitted the claim of the plaintiff. It is argued that if the right were on his side, he would not have hesitated to take the oath. Refusal may either be explicit or implicit by silence. According to this school of thought, the oath would not be retorted to the plaintiff regardless of whether or not the defendant requests to this effect.⁹⁰ It is based on the tradition of the Prophet, which states: "The burden of proof is on him who affirms; the oath on him who denies". This tradition is unequivocal and contains nothing, which implies that the oath may be shifted to the plaintiff. The *Majallah* adheres to this interpretation (Article 1820).

In the opinion of the other *imams* and that of Ahmad ibn Hanbal, according to a second version, the refusal of the defendant to take the oath is not in itself a sufficient ground to render judgment against him, because such refusal is a weak method of proof which must be corroborated by the oath of the plaintiff whether arising from the defendant's request or not. If the plaintiff does take the oath, the judgment would be given in his favour; if not, his case would be rejected. In support of their contention, the adherents of this opinion explain that the tradition of the Prophet referred to above does not mention the possibility that the defendant may refuse to take the oath.

They even cite a tradition of the Prophet in which he decided to retort the oath to the plaintiff.⁹¹ Imam Malik applied this procedure to cases involving property while the Imam al-Shafi'i applied it to all types of cases. A number of the latter's followers, however, including al-Ghazzali, disapproved of the retortion of the oath where the plaintiff is the Sultan.⁹² The Imamiyah Shi'ah

⁸⁹ This is in disagreement with the interpretation of French jurists where the claiming of damages in such cases was forbidden. See the decision of the court of Rethel, on 25 January 1905 (D. 1905. 2. 309).

⁹⁰ Guzelhisari, *Manafi*, 335.

⁹¹ Ibn Qudamah (*Muwaffaq*), *Mughni*, XII, 124.

⁹² Ghazzali, *Wajiz*, II, 266.

school also endorsed the retortion of the oath to the plaintiff.⁹³ Lastly, the Zahiri school and Ibn Abi Layla did not accept the defendant's refusal to take the oath as a ground for judgement, nor the legality of retorting it save in exceptional circumstances. According to this view, if the plaintiff has no evidence and the defendant refuses to take the oath as required, he would be compelled to do so whether he likes it or not. In other words, a defendant may either admit the claim of the plaintiff or deny it and take an oath in support of his stand.

Most modern codes, which accept the oath as a method of proof, have chosen a middle course. Like the Hanafi school, they rule against the defendant if he refuses to take the oath, but, consistent with the other Islamic schools; they allow the defendant to retort the oath to the plaintiff. In such a case, if the plaintiff takes the oath, the judgment would be given in his favour; if he refuses, his case would be rejected. Thus Article 232 of the Lebanese Code of Civil Procedure states: "A person who refuses when asked to take an oath, or refuses to retort it to his opponent, or, when retorted by his opponent, refuses to take such an oath, forfeits his claim or his defence".

d. Use of the oath

The oath is one of the oldest means of establishing proof or of adjudication. It is generally based on the principle of reminding the swearer of his religious faith and of God who requires truthfulness and integrity. It is reasoned that this might induce him to state the truth and deter him from expressing lies and falsehood. Judicial experience shows that the oath is a weak method of proof, not resorted to except in the absence of other evidence and that the persons asked to swear the oath usually do so easily except on rare occasions. Its method of proof is not incorporated in several civil codes. Although it is adopted in most Latin countries, we find that in many other legal systems including the English system, it is not recognized as a decisive form of evidence in a sense explained here.

Moreover, the oath, even in those countries which recognise it, is being used less today than formerly. For example, the Ottoman Code of Civil Procedure stated: "A person who is incapable of establishing his claim should be asked whether or not he wants his opponent to take an oath" (Article 92). That is to say; it was the duty of the judge to remind the plaintiff of his right to request an oath from the defendant in case the plaintiff failed to establish his claim. The Lebanese Code of Civil Procedure, however, does not require this action.

e. Oath tendered by the judge

⁹³ Hilli, *Shara'i*, 301.

Is a judge entitled, on his initiative, to tender the oath to any of the litigants? Several modern legal systems have recognised what is called "the suppletory oath" to distinguish it from the decisive oath referred to earlier. In the Lebanese Code of Civil Procedure it is an oath which a judge, on his initiative, requests from either of the two litigant parties when neither the claim nor the defence is sufficiently established but when, at the same time, they are not wholly devoid of evidence (Articles 228, 237). In other words, if the statements of either of the litigants lack in evidence, the judge may require that the oath of that particular litigant supplements them.

This oath is similar to that required of the plaintiff in some schools of Islamic jurisprudence to support the testimony of a sole witness where such testimony and the oath of the plaintiff are deemed sufficient. We have already observed that the Hanafi school and the *Majallah* disapprove of this procedure of proof. The fundamental rule is enunciated in Article 1746 of the *Majallah* as follows: "The oath is only administered upon the application of the opponent. In four cases, however, the oath is administered by the court without any application:

- a. When a person lays claim to and proves that he has an interest in the estate of a deceased person, the court shall require the plaintiff to swear an oath that he has not received anything by any means, directly or indirectly, in satisfaction of his interest from such deceased person, nor has he given a release thereof, nor assign edit to any other person, nor received anything in satisfaction thereof from any other person, nor received any pawn by way of security for his interest from the deceased person. Such form of oath is known as *istizhar*.
- b. When a person appears claiming to be entitled to the certain property and proves his case, the court shall require an oath to be taken by such person that he has not sold such property, nor disposed of it by way of gift, nor divested himself in any way of the ownership therein.
- c. When a person wishes to return a thing purchased on account of the defect, the court shall require him to take an oath that he did not, either expressly or implicitly, because of any disposition of such a thing, as if it were his property ... assent to the defect in the thing purchased.
- d. When the court is about to give judgment in a case of pre-emption, the court shall require the person claiming the right of pre-emption to swear an oath that he has not waived the right of pre-emption in any way whatsoever".

The first oath, namely *istizhar*, is agreed upon by all the Hanafi jurists; the other oaths were propounded by Imam Abu Yusuf. Later he added to them another oath which is taken in the following circumstances:

If a woman asks for maintenance from her absent husband, she must swear in the name of God that her husband had not left her any provisions,

nor given her maintenance.⁹⁴ Finally, the *Majallah* provides for certain circumstances under which a judge may put both parties to the oath,⁹⁵ but these are beyond the scope of this book.

f. Other Aspects Of Evidence

a. Documentary Evidence (*Al Kitabah*)

In the present day, written evidence consisting of documents and written instruments is one of the most important and effective methods of proof. The reason for this is the prevalence of literacy today as compared to what it was in the past. Many modern codes, including, as we have seen, the Ottoman and the Lebanese, required the presence of such evidence in important civil cases, and excluded testimony except in restricted and exceptional circumstances.

But this was not the case in the past. For example, a French legal maxim in the Middle Ages stated: "*Temoins passent lettres*".⁹⁶ Similarly, in the *shariah*, personal evidence (testimony) was the norm, due to the lack of writing and recording in the olden days and in view of the fact that people were not accustomed to the use of written documents, except in the case of a debt payable on a future date where a specific provision was made: "O ye who believe! When ye contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in terms of justice" (*Quran* 2: 282).

The jurists, however, maintained that written evidence was merely recommended and not obligatory.⁹⁷ Therefore, the Islamic books on jurisprudence did not attach the great weight to written evidence that they gave testimony. Besides, there were many controversies concerning the conditions for accepting written evidence. At any rate, it was not regarded by jurists as one of the primary methods of proof but was merely mentioned in connection with admission by writing and with giving testimony to ascertain the authenticity of such writing.⁹⁸ It will suffice to give a summary of what the *Majallah* provides in this regard. It is a fundamental principle in the Hanafi school that no reliance should be placed upon writing, because "handwritings resemble one another", and because writing, to quote *Al-*

⁹⁴ Ibn al-Bazzaz, *Fatawa*, V, 68-69; and Articles 97 and 99 of the Ottoman Law of Family Rights.

⁹⁵ *Majallah*, Article 1778 ff.

⁹⁶ Colin et Capitant, *Courts*, II, 221.

⁹⁷ For the interpretation of this verse see Razi, *Mafatih*, II, 364; and Ibn Hazm, *Muhalla*, VIII, 346, No. 415.

⁹⁸ See for example Sarakhsi, *Mabsut*, XVIII, 172 ff. ; Hattab, *Mawahib*, VI, 187 ff. ; and Ibn Farhun, *Tabsirat*, I, p. 294.

Fatawa al-Khayriyah "falls outside the recognised methods of proof in the *shari'a*, namely testimony, admission and refusal to take the oath..."⁹⁹

However, as people began to depend more and more upon written documents in their transactions, later jurists accepted writing through *istihsan* or preference.¹⁰⁰ The *Majallah* adopted the same course and recognised proof using promissory notes, registers of merchants and the like, provided; they were free of taints of forgery and fabrication. It considered admission in writing the same as oral admission, and it recognised official documents if they were free from any taint of fraud or forgery, e.g., the Sultan's rescripts, entries in land registers and court files.¹⁰¹

g. Conclusive Presumption

In conclusion, it is necessary to point out that in addition to the methods of proof previously mentioned, i.e. admission, testimony and oath; there is still another one which may form a basis for judgments, called conclusive presumption. The *Majallah* says, "A conclusive presumption is also a ground for judgment" (Article 1740). It is defined as "an inference, which amounts to the degree of certainty. Example: A is seen leaving an empty house with a bloodstained knife in his hand; B thereupon enters the house and finds C, who has just had his throat cut. There is no doubt that A is the murderer of C and no regard is given to the possibility that C killed himself" (Article 1741). This example, which was related by the jurist Abu al-Yusr Muhammad ibn al-Ghars,¹⁰² is upheld whenever a judge is convinced that the fact is certain. Such certainty undoubtedly depends upon the circumstances of the case, for it is possible that the frightened person seen leaving the house might be a relative of the victim, having hurried to the house upon hearing the screams of the victim, picked up the blood-stained knife and dashed out calling for help or looking for the murderer to take vengeance on him with the same knife. In such a case it would be erroneous to consider him the murderer. The Hanafi jurists have cited several examples where a presumption may be a ground for judgment. For example, if two persons, one being a merchant and the other a shipmaster, should disagree about the ownership of a boat loaded with flour and neither of them has any evidence; the flour would be presumed to belong to the merchant and the boat to the shipmaster.¹⁰³

These presumptions are based upon circumstantial facts, public usages

⁹⁹ Ramli, *Fatawa*, II, p. 67.

¹⁰⁰ Sarakhsi, *Mabsut*, loc. cit.; Ibn Nujaym, *Ashbah*, 86; Ibn Abidin, *Nashr*, 41-42; and Guzelhisari, *Manafi'*, 329.

¹⁰¹ For details see *Majallah*, Article 1606-1612 and 1736-1739.

¹⁰² Ibn Abidin, *Nashr*, 21.

¹⁰³ *Ibid.*, 19 ff.

and the discretion of the judge. Therefore, they have been called "the presumptions of customary circumstances". Nowadays they are accepted in penal cases and are left to the discretion of the judge and his conscience. In civil matters, however, they are not accepted without limitation. In the Lebanese Code of Civil Procedure, these presumptions have been described as *de facto* presumptions, and have been defined as "results deduced by a judge from a known fact to an unknown one". Their application is left entirely to the judge's discretion. But they may not be accepted except in cases where the law permits the hearing of personal testimony, and only when they are "grave, precise and concordant." (Articles 302, 310).

There is another category of presumptions. They are the legal presumptions deduced by the lawmaker from a known fact to be applied to an unknown one. The Lebanese Code of Civil Procedure has this example: "If the possession of a specific movable property is exercised *bona fide*, peacefully, openly and unequivocally, it is presumed to be coupled with the right of ownership, and no evidence contrary to this presumption may be entertained" (Article 307).¹⁰⁴ Various examples of these legal presumptions are found in the *shari'a*, we discussed some of them while dealing with *istishab* (presumptions of continuity). Another presumption of this kind is the presumption of paternity attributed to the husband under certain well-known conditions, based on the tradition: "The offspring follows the (nuptial) bed".¹⁰⁵

h. Contradictions in Testimonies

Some legal maxims relate to contradictions in matters of proof. These contradictions are of two types: contradictions in the testimony of witnesses and contradictions in the statements of the plaintiff. First- Contradiction in the testimony of witnesses. These contradictions occur when witnesses change the testimonies previously given. The *Majallah* says, "Contradiction and proof are incompatible, but this does not invalidate a judgment given. For example, if witnesses retract their testimony, such testimony is not conclusive; but if the court has already given judgment based upon the original testimony, such judgment may not be set aside, but the witnesses must pay damages equivalent to the value of the subject matter of the judgment" (Article 80).

Article 1728 of the *Majallah* explains this rule by saying, "Should witnesses after giving their evidence, but before judgment, withdraw the

¹⁰⁴ This corresponds in French to the rule which says, "*En fait de meubles, possession vaut titre.*"

¹⁰⁵ Reported in all recognized tradition collections. See Ayni, *Umdat*, XXIII, 249, and Muslim, *Sahih*, IV, p.171.

evidence in court, such evidence is considered not to have been given, and the witnesses shall be reprimanded". Jurists agree on this point. But "Should witnesses who have given evidence in court withdraw such evidence after judgment has been delivered, the judgment stands, but the witnesses must pay the value of the subject matter of the action to the party against whom judgment has been made" (Article 1729). A case is reported to have come up before the Caliph Ali ibn Abi Talib who heard two witnesses give testimony implicating a third person in the act of theft. `Ali ordered that the said person's hand be cut off. The two men later returned with another person contending that he was the actual thief and not the man whose hand had been cut off. Ali retorted: "I do not believe your charges against this man, and I order that you pay blood-money for causing the amputation of the other person's hand. If I knew that you had done this deliberately, I would have ordered your hands cut off".

Non-interference with a judgment even after witnesses retract their testimony is agreed upon by the majority of jurists. The reason for this ruling has been explained in *Al-Ihkam* by Shihab al-Din al-Qarafi thus: "Trustworthy statements and legal causes establish a judgment. A later allegation by witnesses that their testimony was false is an admission that they are impious, and the statements of such people cannot vitiate a judgment".¹⁰⁶ However, several jurists including the Imam al-Awzai, Said ibn al-Musayyab (d. 709-10 A.D.) and the followers of al-Zahiri school disputed this interpretation. They said that a judgment should be revoked in all circumstances when witnesses retract their testimony. A judgment, they maintained, is established by testimony; if the witnesses withdraw their testimony, which established the judgment, it would no longer be valid. Some jurists apply this interpretation in penal cases involving public (God's) rights or retaliation so that a verdict would not be enforced if witnesses retract their testimony, because it is said that such cases should be set aside in the face of doubt.¹⁰⁷ Finally, most modern laws grant those against whom the testimony is given the right to demand the annulment of the decision, within certain conditions, if the falsehood of the testimony upon which the judgment was based is established. Thus, Article 349 of the Ottoman Criminal Procedure Code and Article 537 of the Lebanese Code of Civil Procedure sanction a re-trial in such circumstances.

Second- Contradiction in the statements of the plaintiff. The *Majallah* defines a contradiction of this kind as "some statement previously made by

¹⁰⁶ Qarafi, *Ihkam*, p.9.

¹⁰⁷ Sarakhsi, *Mabsut*, XVI, 178; Ibn Qudamah (Shams), *Sharh*, XII, 113 ff.; Ibn Hazm, *Muhalla*, IX, 429; and Nawawi, *Minhaj*, 137. See in these references also the question of having witnesses make good the damage resulting from also testimony, and the views of the various schools.

the plaintiff which conflicts with the action he has brought, and which causes such action to be declared null and void" (Article 1615). The following are some examples:¹⁰⁸ "If a person admits that certain property belongs to another, he may not later bring an action claiming that such property is his . . ." (Article 1648). And "If a person releases another from all actions, he may not later bring an action against such person claiming from him property which he asserts to be his own . . ." (Article 1649). Another article of the *Majallah* says,¹⁰⁹ "A thing which has been discharged or annihilated cannot be restored" (Article 51). The meaning of this maxim is that if a person releases another from a claim he may not retract this release and reclaim the same right, because such an action contradicts the release. It is necessary, however, that the right in question should belong to the person making the release and should be in existence at the time of the release.

Thus, if a person renounces his right of inheritance before the death of the *de cuius*, his renunciation would not be valid. It would be valid, however, if made after such death. This maxim above is derived from another maxim:¹¹⁰ "If any person seeks to disavow any act performed by himself, such an attempt is disregarded" (Article 200). For example, if the guarantor of the seller claims ownership of the thing sold, his claim would not be sustained because it contradicts the contract of guarantee.

D. Conclusion

The existence of legal maxims whether opinion or reality developed as a consequence of particulars because it functions as an integrator of sporadic particulars together with their meanings. On the other hand, the principle must exist before the existence of its particulars because it will be the basis for the jurist to determine the rules. Its position is similar to the position of the *Qur'an* concerning the *Sunnah* and the text of the *holy Quran* stronger than its manifestation. The principles as the precedent to the *furu'* (particulars) mean the particulars pre-existed or were the influence for the development of *usul al-fiqh*. Its position is like the child to the parent, fruit to the tree and the plant to the seed. Islamic Legal maxims are similar to principles of Islamic jurisprudence in some respects and different in other respects. The similarity is that both are principles that cover various particulars whereas the difference is that the originating principles cover variously detailed proofs whereby it is possible to extract the law from it. On the other hand legal maxims are concerned with jurisprudential issues only.

The *mujtahid* may reach it by grasping the distinctive — issues in

¹⁰⁸ See *Majallah*, Articles 1647-1659.

¹⁰⁹ Ibn Nujaym, *Ashbah*, 127.

¹¹⁰ Ibn Abidin, *Radd*, I, 5; and Ibn al-Bazzaz, *Fatawa*, IV, Latin proverb, "*Nemo contra factum suum venire potest.*"

principles of Islamic jurisprudence. When the jurists apply the rules to particular rules, they are not maxims. However if they express the rules with universal statements wherein there exist various particular rules, then they are deemed as maxims. In a nutshell, it can be concluded that the difference between legal maxims and originating principles is the subject matter. The subject matter of originating principles is proof of rules. Thus it relates to commands, prescriptions, general phrases, specific phrases, absolute phrases, conditional phrases, comprehensive phrases, divergent phrases, logic and understanding and abrogating and abrogated.

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